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No. 86-621

In the Supreme Court of the United States

OCTOBER TERM, 1986

BAYARD SPECTOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court erred in quashing a subpoena for the production of tape recordings belonging to a witness, where the witness had prepared the recordings at the request of his attorney and where the recordings were in the attorney's possession.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A37) is reported at 793 F.2d 932.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. A38). On September 8, 1986, Justice Blackmun extended the time within which to file the petition for a writ of certiorari to and including October 13, 1986 (Pet. App. A39). The petition for a writ of certiorari was filed on October 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and on one count of traveling in interstate commerce with intent to promote an unlawful activity, in violation of 18 U.S.C. 1952(a)(3). Pet. App. A2 n.1. Petitioner was sentenced to a total of 11 years' imprisonment and a $5,000 fine (*ibid.*). The court of appeals affirmed (Pet. App. A1-A37).

2. The evidence at trial established that petitioner participated in a conspiracy, initiated by a Drug Enforcement Agency informant in Miami, Florida, to supply 24 kilograms of cocaine at $50,000 per kilogram every six weeks to a group of buyers in St. Louis, Missouri (Pet. App. A3-A5). Petitioner personally agreed to supply five kilograms of cocaine for the initial transaction (*id.* at A5-A6).

Pursuant to their agreement, petitioner met with his co-conspirators and the informant in a hotel in St. Louis to complete the transaction (Pet. App. A5-A6). At the hotel, petitioner expressed a desire to participate in future transactions (*id.* at A6). Petitioner ran from the room, however, when he noticed a transmitter in the informant's pocket (*ibid.*). DEA agents arrested petitioner soon thereafter (*ibid.*).

At trial, the informant and two of petitioner's three co-conspirators testified against petitioner (Pet. App. A6-A7).[1] The evidence at trial showed that in exchange for the informant's cooperation, the government had agreed not to prosecute him, his family, or his girlfriend for past crimes (*id.* at A4). The coop-

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[1] All three of the co-conspirators pleaded guilty.

eration agreement provided that the government would review in "good faith the extent and value of [his] information and cooperation as it relates to successfully solving and prosecuting crimes" in determining whether to reduce the charges against him and whether to recommend reductions in his sentences (*ibid.*). The informant's testimony at trial was confined to petitioner's activities at the St. Louis hotel (*id.* at A12). In addition, the informant supplied the government with a tape recording he had made of a conversation between himself and one of petitioner's co-conspirators. The tape recording also contained the informant's account of some of his investigative activities (see *id.* at A17). During petitioner's trial, the government furnished pertinent portions of that tape recording to petitioner pursuant to the Jencks Act, 18 U.S.C. 3500.

On cross-examination, the informant revealed that at the direction of his attorney and without the government's approval, he had made a series of tape recordings of his undercover activities. Except for the one recording he provided directly to the government, the informant testified, he had sent the tape recordings directly to his attorney, who secured them in a safe. The recordings, the informant said, were prepared in order to assist the attorney in representing the informant in negotiations with the government (Pet. App. A21; see Pet. 18). Petitioner served a subpoena on the informant's attorney to produce the tape recordings in his possession. The attorney moved to quash the subpoena on the ground that the disclosure of the recordings would violate the attorney-client privilege (Pet. App. A21-A22). The district court quashed the subpoena (*id.* at A23).

3. The court of appeals affirmed (Pet. App. A1-A37). The court reasoned that the tape recordings were confidential communications between the informant and his attorney because they were made at the attorney's direction to assist the attorney in representing his client and were not intended to be disclosed to a third party (*id.* at A21-A23). The court noted that the government did not know the contents of the tape recordings and never had them in its possession (*id.* at A21).[2]

ARGUMENT

The decision of the court of appeals is correct, it does not conflict with any decision of any other court of appeals or of this Court, and it presents only a factbound issue that warrants no further review.

1. Petitioner contends (Pet. 13-51) that the refusal to produce the informant's tape recordings violated the Confrontation Clause, which guarantees a criminal defendant the right to cross-examine a witness to impeach his testimony. See *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 6. The Confrontation Clause, however, guarantees " 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Ibid.* (quoting *Delaware* v. *Fensterer*, No. 85-214 (Nov. 4, 1985), slip op. 4-5 (emphasis in original)). Petitioner cites no support for his novel proposition that the Confrontation Clause requires that a witness who testifies against a criminal defendant must turn over

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[2] Judge Heaney dissented. In his view, all the tape recordings, including those never in the government's possession, were Jencks Act material and should have been disclosed to petitioner (Pet. App. A31-A35).

to the defendant any notes, diaries, or documentation, not in the government's possession to impeach the testimony of the witness.[3] Where, as in this case, the requested records are the witness's confidential communications to his attorney and, therefore, are covered by the attorney-client privilege (see *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)), there is no authority to suggest that the Confrontation Clause compels their disclosure.[4] The Confrontation Clause

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[3] Because the tape recordings at issue were not prepared at the government's direction and were never in the government's possession (see Pet. App. A21), they are not covered by the Jencks Act, 18 U.S.C. 3500. Contrary to petitioner's claim (Pet. 31-32) and the dissenting opinion below (Pet. App. A32), neither the possibility that petitioner might later decide to turn the tape recordings over to the government nor the fact that petitioner previously supplied the government with one tape recording renders the remaining tape recordings, which were in his attorney's exclusive possession, the "functional equivalent" of evidence in the government's possession for the purposes of the Jencks Act.

[4] Petitioner's claim (Pet. 40-42) that the witness waived the attorney-client privilege with regard to all the tape recordings, even if relevant to the Confrontation Clause question, also lacks merit. As the court of appeals found (Pet. App. A21), the critical inquiry with respect to waiver is whether the witness prepared the tape recordings with the intent to reveal them to a third party. Nothing in the record suggests that he did so in this case. Moreover, the witness plainly did not waive his privilege as to all the tapes by sending one tape recording to the government; indeed, the tape recording he sent to the government was one he had never given to his attorney. Consequently, that recording was never covered by the privilege in the first instance. Finally, petitioner is wrong in claiming (Pet. 40) that the informant waived any privilege he might have had in the tapes by testifying about the underlying events described in the tapes. The privilege did not extend to testimony about those events (see *Upjohn Co.* v.

cases on which petitioner relies (Pet. 22-23) involve restrictions on a defendant's cross-examination of a witness at trial. None of those cases suggests that the Confrontation Clause would be violated by the failure of a court to compel the production of documentary materials in the hands of a third party.

Rule 17(c), Fed. R. Crim. P., provides the sole legal basis for requiring a witness to produce documents in a criminal case. Pursuant to that rule, a court may quash a subpoena that calls for privileged matter. See 2 C. Wright, *Federal Practice and Procedure: Criminal* § 275, at 162-163 (2d ed. 1982). That is what the district court did in this case, and the district court's ruling on the privilege issue does not warrant further review by this Court.[5]

2. In any event, any restriction on petitioner's ability to cross-examine the witness was harmless beyond a reasonable doubt. See *Delaware* v. *Van Arsdall*, slip op. 6. As the court of appeals found (Pet. App. A12), the informant's "testimony had very little to do with [petitioner's] conviction." The government had a "strong and persuasive case" against petitioner in the absence of that testimony, because "[t]he most damaging testimony was given by [two of his co-conspirators]" (*id.* at A12, A17).

United States, 449 U.S. 395, 396 (1981)). The informant's testimony therefore could not amount to a waiver of the privilege.

[5] Petitioner suggests (Pet. 23-28) that a different result should obtain here because the witness had a "cooperation agreement" with the government which, according to petitioner, gave the witness a great incentive to lie. The jury, however, was fully apprised of the terms of the agreement, and petitioner had every opportunity to impeach the witness's testimony on that basis, which petitioner attempted to do on cross-examination (see Pet. App. A17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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